



FH

**STATE OF WISCONSIN
Division of Hearings and Appeals**

In the Matter of

[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

REHEARING DECISION

MDD/166404

PRELIMINARY RECITALS

Pursuant to a petition filed April 22, 2015, under Wis. Stat. § 49.45(5), and Wis. Admin. Code § HA 3.03(1), to review a decision by the Brown County Human Services in regard to Medical Assistance, a telephone hearing was held on June 23, 2015. A decision was issued on July 31, 2015, dismissing the appeal. Petitioner timely requested a rehearing. On August 10, 2015, the Division of Hearings and Appeals granted the rehearing. Because no additional evidence or testimony is necessary, this decision is being issued based upon the information filed with the rehearing request.

The issue for determination is whether petitioner is disabled.

There appeared at that time and place the following persons:

PARTIES IN INTEREST:

Petitioner:

[REDACTED]
c/o [REDACTED]
[REDACTED]
[REDACTED]

Respondent:

Department of Health Services
1 West Wilson Street, Room 651
Madison, Wisconsin 53703
By: No Appearance

ADMINISTRATIVE LAW JUDGE:

Peter McCombs
Division of Hearings and Appeals

FINDINGS OF FACT

1. Petitioner is a 56 year old resident of Brown County.
2. The petitioner applied for MA alleging disability on or about November 7, 2015. The basis for petitioner's disability application was her diagnoses of emphysema, COPD, incontinence and

general anxiety disorder. Petitioner is medicated to treat each diagnosis. Petitioner's medical history is significant for carpal tunnel surgery.

3. The Disability Determination Bureau (DDB) sent a March 31, 2015 notice to the petitioner concluding that petitioner was not disabled due to "no severe impairment" (not severe enough to prevent petitioner from working).
4. During the December 1, 2011 hearing, petitioner testified that she cares for her disabled husband as well as six grandchildren who reside with them.
5. The petitioner's last employment was in the early 2000's at a wood mill.
6. Petitioner testified that she is not presently seeking employment due to her responsibilities of caring for her husband and grandchildren.
7. The petitioner has a high school diploma.
8. Petitioner was diagnosed with cancer on or about July 22, 2015.

DISCUSSION

A person between ages 18 and 65, with no minor children, must be blind or disabled to be eligible for MA. In order to be eligible for MA as a disabled person, an applicant must meet the same tests for disability as those used by the Social Security Administration to determine disability for Supplemental Security Income (Title XVI benefits). § 49.47(4) (a)4., Wis. Stats. Title XVI of the Social Security Act defines "disability" as the inability to engage in any substantial gainful activity due to physical or mental impairments which can be expected to either result in death or last for a continuous period of not less than 12 months.

Under the regulations established to interpret Title XVI, a claimant's disability must meet the 12-month durational requirement before being found disabling. In addition, the disability must pass five sequential tests established in the Social Security Administration regulations. Those tests are as follows:

1. An individual who is working and engaging in substantial gainful activity will not be found to be disabled regardless of medical findings. 20 CFR 416.920.
2. An individual who does not have a "severe impairment" will not be found to be disabled. 20 CFR 416.920(c). A condition is not severe if it does not significantly limit physical or mental ability to do basic work. 20 CFR 416.921(a).
3. If an individual is not working and is suffering from a severe impairment which meets the duration requirement and meets or equals a listed impairment in Appendix I of the federal regulations, a finding of disabled will be made without consideration of vocational factors (age, education, and work experience.) 20 CFR 416.920(d).
4. If an individual is capable of performing work he or she has done in the past, a finding of not disabled must be made. 20 CFR 416.920(f).
5. If an individual's impairment is so severe as to preclude the performance of past work, other factors, including age, education, past work experience and residual function capacity must be considered to determine if other types of work the individual has not performed in the past can be performed. 20 CFR 416.920(f).

(Emphasis added).

These tests are sequential. If it is determined that an applicant for MA is employed or does not suffer from a severe impairment it is not necessary to proceed to analyze the next test in the above sequence. If a person's condition does not meet the SSA listings an analysis of capability to perform past work must be made. If the individual cannot perform past work a determination of the residual functioning capacity to perform other work must be made. 20 CFR 416.920(a).

Although the determination of disability depends upon medical evidence, it is not a medical conclusion; it is a legal conclusion. Thus, the observations, diagnoses, and test results reported by the petitioner's physicians are relevant evidence, however the opinions of the doctors as to whether the petitioner is disabled are not relevant. The definitions of disability in the regulations governing MA, Supplemental Security Income (SSI), and Social Security Disability Insurance (SSDI) programs require more than mere medical opinions that a person is disabled in order to be eligible. There must be medical evidence that an impairment exists, that it affects basic work activities, that it is severe, and that it will last 12 months or longer as a severe impairment.

If the petitioner is working at a job that is considered to be substantial gainful employment, she will be found to be not disabled without further review. During the hearing, the petitioner indicated that she is not employed, and is not presently seeking employment.

In determining whether a disability is "severe" under 20 C.F.R. § 416.920(c), the Bureau applies the following test:

If you do not have any impairment or combination of impairments which significantly limits your physical or mental ability to do basic work activities, we will find that you do not have a severe impairment and are, therefore, not disabled. We will not consider your age, education and work experience.

In this particular case, DDB determined the petitioner does not have severe impairment. The evidence in the record at the time of hearing supported this conclusion. However, the petitioner requested a rehearing based upon newly discovered evidence, i.e., her cancer diagnosis on or about July 22, 2015. Accordingly, based upon the new diagnosis, I will remand this matter to the DDB to review petitioner's current medical status and re-determine petitioner's disability status pursuant to § 49.47(4), Wis. Stats.

CONCLUSIONS OF LAW

Newly discovered evidence warrants a redetermination of petitioner's disability determination pursuant to § 49.47(4), Wis. Stats.

THEREFORE, it is

ORDERED

That this matter is remanded to the Disability Determination Bureau with instructions to review whether, in light of the petitioner's recent cancer diagnosis, she is disabled. The Bureau shall consider her latest medical records when making its determination. It shall make this determination within 21 days of the date of this decision unless it obtains her consent to waive these time limits. If she disagrees with the forthcoming Bureau's determination, she may file a new appeal with the Wisconsin Division of Hearings and Appeals.

REQUEST FOR A REHEARING

You may request a rehearing if you think this decision is based on a serious mistake in the facts or the law or if you have found new evidence that would change the decision. Your request must be **received within 20 days after the date of this decision**. Late requests cannot be granted.

Send your request for rehearing in writing to the Division of Hearings and Appeals, 5005 University Avenue, Suite 201, Madison, WI 53705-5400 **and** to those identified in this decision as "PARTIES IN INTEREST." Your rehearing request must explain what mistake the Administrative Law Judge made and why it is important or you must describe your new evidence and explain why you did not have it at your first hearing. If your request does not explain these things, it will be denied.

The process for requesting a rehearing may be found at Wis. Stat. § 227.49. A copy of the statutes may be found online or at your local library or courthouse.

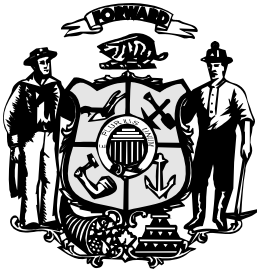
APPEAL TO COURT

You may also appeal this decision to Circuit Court in the county where you live. Appeals must be filed with the Court **and** served either personally or by certified mail on the Secretary of the Department of Health Services, 1 West Wilson Street, Room 651, Madison, Wisconsin 53703, **and** on those identified in this decision as "PARTIES IN INTEREST" **no more than 30 days after the date of this decision** or 30 days after a denial of a timely rehearing (if you request one).

The process for Circuit Court Appeals may be found at Wis. Stat. §§ 227.52 and 227.53. A copy of the statutes may be found online or at your local library or courthouse.

Given under my hand at the City of Madison,
Wisconsin, this 13th day of August, 2015.

\sPeter McCombs
Administrative Law Judge
Division of Hearings and Appeals



State of Wisconsin\DIVISION OF HEARINGS AND APPEALS

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The preceding decision was sent to the following parties on August 13, 2015.

Brown County Human Services
Disability Determination Bureau
asamsa@hrserase.com